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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 418

NICHOLS & COMPANY, *Petitioner*

vs.

THE UNITED STATES, *Respondent.*

REPLY TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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Respondent's opposing brief, largely by wholesale omission, and partly by misstatement of the significant facts, tends to conceal and obscure the compelling reasons why certiorari should be granted.

Respondent at some length describes the petition in the Court of Claims (Resp. Br. pp. 6-7). Apart from a misleading failure to state that Counts II, III and IV were based on contract rights to grading service (Resp. Br. p. 6; Pet. pp. 12, 18, 21-24) respondent's description neither adds to nor detracts from petitioner's statement. (Pet. 12-15)

Respondent's version of the facts pertaining to Counts I and V, as far as it goes, (Resp. Br. pp. 7-13) is also largely repetitive of petitioner's statement of the case. (Pet. pp. 27-56) What little issue respondent takes with petitioner's statement, it does so erroneously, as petitioner later demonstrates (infra pp. 15-19).

Similarly, respondent's assertion that the Court below wrote an opinion, and made 76 findings, adds nothing to petitioner's statement of the case, and hardly enlightens this Court (Resp. Br. p. 13). It is the *content* of the findings and the opinion, the *soundness* and *accuracy* of the inferences and rulings of the Court below and the consideration given the facts which are in issue, rather than the uncontroverted fact the decision includes an opinion and 76 findings.

Respondent exhibits an ostrich-like avoidance of the significant elements of the case, as petitioner by specific analysis demonstrates. (Infra pp. 15-19) In so doing it proceeds in direct opposition to the requirement of this Court's rule,[1] that it restate the case as stated by petitioner to the extent "necessary in correcting any inaccuracy or omission in the statement of the other side."

On matters concerning which there is no need to speak, respondent speaks freely; on matters strongly demanding that respondent speak, it maintains an eloquent silence.[1]

I. THE PUBLIC IMPORTANCE OF THE LEGAL ISSUES PRESENTED

The incongruity of respondent's silence is clearly apparent in the light of the great public interest attached to the questions of law presented by the record, and which respondent ignores.

The total effect of respondent's brief is dangerously misleading. The indifference of respondent to the questions

[1] Rule 40, par. 3 The effect of respondent's silence as conceding petitioner's statement of the case is discussed infra pp. 15, 16.

of grave public interest presented by the record strongly suggests and insinuates that no such questions exist, and that instead, this Court is confronted only with trivia, unworthy of its attention.

To this misleading implication, petitioner replies at the outset.

A. The Court Below Approved and Licensed Discriminatory Practices by USDA Affecting the Marketing of Agricultural Products

Discriminatory practices of private individuals affecting the market of agricultural commodities are a recognized and legally prohibited evil. The public importance of freedom from such practices has been recognized by this Court in granting certiorari (*Denver Union Stock Yards Co.* v. *Producers Livestock Marketing Assoc.*, 356 U.S. 282, 2 L. ed. 2d 771 (1958)). Yet the Court below approved and in effect licensed such discriminatory practices by the USDA, the very instrument of government charged with their prevention.[2]

Burglary is no less and certainly a greater evil because committed by the police, rather than private individuals. A court would hardly grant a judicial license to the police to commit such wrongs.

Similarly the USDA should not have been licensed by the court below to perpetrate the very offenses which by

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[2] Illustrative of that duty imposed on USDA is *Denver Union Stock Yards* v. *Producers Livestock Marketing Assoc.*, *supra*. The extent and importance of USDA responsibilities are set forth in Symposium on the Regulatory Functions of the Department of Agriculture, 26 George Washington Law Review No. 2, January 1958, pp. 127-296. See particularly Farrington, The Wide Range of the Programs Administered by the United States Department of Agriculture, pp. 127-130; Flavin, the Packers and Stockyards Act, 1921, pp. 161-180 Flavin, The Functions of the Judicial Officer, United States Department of Agriculture, pp. 277-285.

law it is required to prevent. The decision to that effect should not be allowed to stand.

The discrimination practiced by the USDA involved grading service vital to petitioner's business, (Pet. 11) and included (1) complete denial to petitioner of various types of grading service (Pet. 21-24); (2) either grossly inadequate shell egg grading service to petitioner, or, for substantial periods of time, none at all (Pet. 47-50); and insistence by USDA, that whatever shell egg grading service petitioner received be of the most expensive type, through government employees, rather than through the bonded graders generally available to the trade. (Pet. 54-56; Resp. Br. 10, 11; App. F42 p. 51; F49 p. 57)

The discrimination thus practiced against petitioner in grading service was not rendered less discriminatory because also in violation of petitioner's contract rights (Pet. 48-50).

Respondent is silent concerning most of the discrimination which occurred. Following the lead of the opinion, respondent makes express mention only of the discrimination which imposed upon petitioner the more expensive type of grading service. Also, like the opinion, respondent seeks to justify that particular discrimination by the so-called "policy" embodied in Instruction No. 918 (PY)-4 of gradually replacing the inexpensive bonded grader with the more costly NACC (government employee) grader. (Resp. Br. p. 10, p. 18 fn. 5).

In its reference to this so-called "policy" Instruction, respondent blithely disregards the facts, undisputed of record, to the effect that (1) the Instruction was an internal idea, expressed in May 1952, but cancelled by higher authority in the USDA, in January of 1953, before the events occurred to which respondent seeks to make it apply; (2) it never became a regulation embodying policy; and (3) that at best it amounted to a specious and groundless effort to provide semblance of a protective cover to the discriminatory practices against petitioner (Pet. 55, 56).

Under the express provisions of the Administrative Procedure Act, *even if uncancelled* by *higher authority, and even if non-discriminatory in application* the Instruction would be invalid. (Pet. 62; infra, pp. 11, 12)

Apparently recognizing that fact, respondent in argument concedes that the Instruction never became a "rule", and in a footnote, shifts its ground, to rely instead upon a grading service contract provision to the effect that "(a)t the sole discretion of PMA the graders may be either a Federal or State employee or a licensed employee of the applicant . . ." (p. 18, fn. 5)

Thus respondent cryptically abandons reliance on the cancelled Instruction, concedes the discrimination, and seeks to validate it by the contract provision quoted. In so doing respondent assumes that the Act[3] which established the grading service authorized contract permitting the *discriminatory* exercise of discretion, by the very department charged with *prohibiting* such discrimination.

"It would seem untenable that the Federal Government which is responsible for the enactment and enforcement of . . . . regulatory statutes should not be bound by the same . . . limits on its rights of contract. . . ." (*Hughes Transp., Inc.* v. *United States*, 129 Ct. Cl. 804, 121 F. Supp. 212 (1954)).

In this contention respondent also overlooks the express prohibition in the Administrative Procedure Act[4] of agency

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[3] Act of August 14, 1946 (Agricultural Marketing Act of 1946 Sec. 203; 60 Stat. 1087; 7 U.S.C. 1622 (1952)), quoted in respondent's brief, pp. 2, 3.

[4] The above prohibition is fact in Section 10 of the Act dealing with judicial review. 5 U.S.C. 1009(e). Although phrased in terms of a directive to reviewing courts, rather than to agencies, it is nonetheless mandatory upon agencies. It is to "be given a harmonious reading to the end that the basis on which the . . . action is reviewed is coterminous with the basis on which the (agency) is allowed to act." *Harmon* v. *Brucker*, 355 U.S. 579 at 582; 2 L. ed. 2d, 503 (1958).

action which is "arbitrary, capricious (or) an abuse of discretion . . .", and which would nullify a discretionary power to discriminate, if such power would otherwise exist.

B. The Effect of the Decision is to Encourage Discrimination and Oppression by the USDA as Well as Fraud and Corruption

Petitioner's difficulties with the USDA were and are necessarily a matter of common knowledge in the trade, petitioner for years having been one of the nation's largest wholesalers. Mr. Nichols' testimony that as a consequence of his troubles he had become "a leper in the trade" (Tr. 1416, 1417) is undisputed; and that status he acquired from the mere fact of this trouble long before the Court's decision.

It may fairly be assumed that the trade is well aware that petitioner discovered and the Court found persistent and widespread fraud and corruption in egg grading by USDA inspectors at Chicago over the four-year period embraced in petitioner's study (1949-1952); and that the trade knows that McCurley as State Supervisor and Dolson as Area Supervisor, (Pet. 12, 13) shared at the very least executive responsibility for that fraud and its concomitant corruption.

One cannot state the extent to which the trade knows in its entirety the sordid history of the mistreatment of petitioner by McCurley and Dolson, with which respondent has taken no real issue (Pet. 21-56; Resp. Br. pp. 7-12; infra, pp. 16-19).

It may safely be assumed, however, that the trade knows well the characteristics of those men, as evidenced by Dolson's oppressive threat to destroy petitioner for seeking justice (Pet. 13); McCurley's apparent attempt to practice extortion against petitioner before grading the eggs sold USDA (Pet. 28, 29); and McCurley's persistent

falsehood and false testimony in this very proceeding, (Pet. 29, 31, 32, 37, 38, 60, 61) as well as the arbitrary and unjustified denial of grading service by both McCurley and Dolson, essential to petitioner's business, and continuing over a period of years in violation of petitioner's contract rights (Pet. 21-24).

The result reached below would of itself serve as a warning to the trade that nothing is to be gained by questioning acts of the USDA in the Court of Claims, and similarly cause officials of the USDA to derive a feeling of immunity.

But the decision went even further. It expressly stated that petitioner was to be severely condemned for making unfounded charges against McCurley and Dolson. (Pet. 20) Concerning their misconduct, the decision was discreetly silent, while affirmatively commending them as "government officials and employees who were doing their duty", (App. 3) and again as abstaining from doing anything "more than their duty demanded" (App. 7).

It is highly significant that the decision was rendered by the one court "constituted . . . precisely to the end that there may be a tribunal specially qualified to hold the Government to strict legal accounting, and "possessing a greater freedom than is enjoyed by other federal courts to inquire into the legality of governmental action." *Glidden Co.* v. *Zdanok*, U.S. ; 8 L. ed. 2d 671, at 691.

In many situations the Court of Claims is the only forum *legally* available for redress of wrongs to a citizen. (E.g. 28 U.S.C. 1346, 1491; *Larsen* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 697 (1948)).

Thus the one Court to which the public would naturally and normally turn to for relief, and often as a matter of

necessity, ridiculed and condemned the victim of wrong doing, and commended the wrong doers.[5]

It is difficult to conceive of stronger encouragement to wrong doing, or stronger discouragement of efforts to obtain redress in this one Court established for that very purpose.

C. The Decision Presents Important Legal Issues of General Contract Law

The contracts of sale required the quality of the eggs sold to be determined by USDA inspection. The Court below nonetheless upheld McCurley's requirement that petitioner, following inspection of 47 lots initially offered at Peoria, rework all lots thereafter tendered, prior to their inspection or reinspection (Pet. 35-38).

Additionally, the contracts of sale specified in terms of candle power and aperture size, the candler to be used. The USDA in its inspections under the contract of sale employed instead a candler magnifying both the observable scope and the degree of the flaws detected in the candling process. In effect, it used a yardstick, rather than a footrule, as a measure of petitioner's performance. (Pet. 42, 43)

Under law as heretofore applied by this and all other courts, including the Court of Claims, both the rejection without inspection and the use of the improper candler, were breaches of contract, excusing petitioner from passing inspection (Pet. 58).

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[5] The Commissioner found and reported to the Court that there was "no evidence that plaintiff was involved in any violation of regulations pertaining to the inspection and grading service of PMA or in the production of its eggs and egg products." (F 79, R. 134) That finding is unquestionably true. Defendant took no exception to it. (Def. Excep. pp. 191, 192) Yet, conspicuously absent from the Commissioner's findings adopted by the Court is that finding of the Commissioner of petitioner's innocence of wrong doing. (App. 57)

In this proceeding those rules of law were ignored by the Court below. The record therefore presents the question as to whether that established law has now been retroactively reversed; and if so, whether this reversal applies to petitioner only, thereby resulting in a denial of "Equal Justice Under Law", the very ideal sculptured upon the front of the building occupied by this Court.

D. The Record Presents Important Issues of Law Involving the Administrative Procedure Act

In a variety of ways the facts call into play provisions of the Administrative Procedure Act.[6]

Most frequently involved is Section 3 of that act (5 U.S.C.A. 1002) which provides in part:

> "Rules—Every agency shall seperately state and currently publish in the Federal Register . . . (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available . . .; and (3) substantive rules adopted as authorized by law . . . No person shall in any manner be required to resort to organization or procedure not so published."

"Rule" is defined by the Act (Sec. 2(c), 5 U.S.C. 1001 (c)) in the following terms:

> ". . . 'Rule' means the whole or any part of any agency statement of general or particular applicability and future effect designed to . . . or prescribed the law or policy or to describe the organization, procedure, or practice requirements of any agency . . ."

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[6] Act of June 11, 1946, 60 Stat. 237, 5 U.S.C. 1001 et seq.

1. The Significance of Petitioner's Omission to Request Formal Appeal Grading of Lots Graded by McCurley and Young

The Court below drew an inference adverse to petitioner because of its failure to make a formal request for appeal grading of lots which McCurley and Young had rejected. In this indirect fashion petitioner was in effect penalized for failing to request formally the permissive appeal grading authorized by the regulations (as distinguished from the contracts of sale) (Pet. 40, 41, Resp. Br. 3-5).

The regulations relating to appeal grading set forth no standards to be followed in the grading on appeal (Pet. 6, 7, 40, 41; Resp. Br. pp. 3-5). Under the express term of Section 3 of the Administrative Procedure Act, it was error to require petitioner "in any manner . . . to resort to organization or procedure not . . . published."

This is no mere technical argument. Petitioner while performing the contracts, endeavored to ascertain the standards and procedure used on such an appeal. Mr. Nichols questioned McCurley in that regard. As McCurley himself reported to USDA (Pl. Ex. 229), Mr. Nichols then

> ". . . was informed that we could not overlook what we had already found on the previous grading unless the eggs had been worked or the lot changed so that we would not be drawing our samples from the same lot of eggs . . ." (Pl. Ex. 229)

Further requests for explanation and enlightenment of the seemingly illusory nature of such an appeal were made of Mr. Termohlen, Head of the Poultry and Egg Division of USDA. They proved fruitless. (Pet. 41; Tr. 76, 77, Pl. Exs. 11, 12)

The practice at the time was in fact to average the results of the grading appeal with the grading on appeal, thereby permitting the grading appealed from either partially or completely to prove its own correctness (Pet. 41).

Section 3 of the Administrative Procedure Act was designed to prevent the public from being led down such

blind alleys, into booby traps. It has been held to mean just what it says in that regard. *Hotch* v. *U.S.*, 212 F. 2d, 280 (C.A. 9, 1954); *U.S.* v. *Morelock*, 124 F. Supp. 932 (D.C. Md. 1954). The decision below is to the opposite effect, and permits agencies to play the shell game with the public despite the Administrative Procedure Act.

2. The Force and Effect to be Given Instruction No. 918(PY)-4

Instruction No. 918 the Court below treated as operative in several ways. The Instruction was ruled to justify the prevention of Anna Chambers, bonded shell egg grader, from performing that function for which she was duly licensed. (App. 15, Pet. 54-56)

The Court also used it to give the semblance of fairness to the illusory frozen egg grading service offered petitioner following cancellation of the contracts, ruling such proposed service to be "no more onerous . . . *read in conjunction with Instruction No. 918* . . . than was permitted by the law and regulations." (App. 20; emphasis supplied) The Court's conclusions in this regard cannot be reconciled with the facts.[7] Petitioner has already shown the Instruction inoperative and ineffective as a matter of law.[8] (Pet. 62; supra pp. 4, 5)

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[7] The Court overlooked the not too trifling circumstance that Instruction No. 918 was cancelled by higher authority before the events occurred which brings its application into question. (*supra*, pp. 4, 5) Also, the USDA proposal following cancellation which would permit Mrs. Chambers to supervise egg processing operations under the contract without grading the frozen eggs was illusory and meaningless. Petitioner needed no authority from USDA to have Mrs. Chambers act as such a supervisor. It needed only authority for Mrs. Chambers to do grading which the proposal forbade. (Pet. 54-56)

[8] But even if the Instruction had not been cancelled, and even if its application were nondiscriminatory, it could not stand and be given legal effect, consistently with the provisions of Section 3 of the Administrative Procedure Act, for lack of official adoption and

Respondent in its statement of the case asserts that "Mrs. Chambers' authority was limited . . . pursuant to the policy expressed in Instruction No. 918 . . . (Resp. Br. p. 11). In argument, however, as previously pointed out, (supra, pp. 5, 6) respondent abandons the Instruction as justification for denying petitioner of her services as an official grader, decision relying instead on a provision of the grading service contracts permitting "the graders to be, in the discretion of the USDA, either a federal or state employee or a licensed employee of the applicant". (p. 18, fn. 5)

Apart from the discriminatory aspects of the status the USDA sought to confer on Mrs. Chambers, the contract clause by its very terms does not apply. A grader is one authorized to grade through the issuance of official certificates. (7 C.F.R. Sec. 55.2(i) (1949 ed.); Pet. pp. 45) The contract clause could not apply to her, since she was denied authority to grade.

E. The Disputes Clause

The contract of sale between petitioner and USDA contains the standard disputes clause.[9] Petitioner promptly and repeatedly complained about the inspections made by McCurley and Young, and to the contracting officer, orally and in writing. (Pet. 41)

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publication as a regulation. (Pet. 62) In fact, the unpublished Instruction as applied to Mrs. Chambers, was inconsistent with published regulations entitling her as a licensed grader to issue certificates until her license was suspended or revoked by notice and hearing. (7 CFR Sec. 55.35, Pet. 9) No such suspension or revocation occurred. (Pet. 48)

[9] ARTICLE 22. DISPUTES. Any dispute concerning questions of fact which may arise under the Contract and which is not disposed of by mutual agreement, shall be decided by the officer executing the Contract in behalf of the Agency or by a designee of the Agency who shall reduce his decision to writing and mail a copy to the Contractor. . . . Pending decision of such dispute the Contractor shall diligently proceed with the performance of the Contract.

As grounds for questioning the accuracy of the inspections, petitioner challenged the fairness, freedom from bias and honesty of purpose of McCurley. (Pet. 41)

At the time of these complaints, petitioner was only beginning to perform contracts which by their terms would require months of grading before completion. The petitioner's complaints, therefore, by their very nature involved future as well as past gradings by McCurley.

The situation, therefore, was particularly appropriate for exercise of the authority granted by the disputes clause. "Arbitrary rulings and actions of subordinate officers are often adjusted most easily and satisfactorily by their superiors. Furthermore, (the disputes clause) provided the Government with an opportunity to mitigate or avoid damages by correcting errors or excesses of its subordinate officers. Having accepted and agreed to these provisions, (petitioner) was not free to disregard them without due cause, accumulate large damages and then sue for recovery in the Court of Claims. Nor can the Government be so easily deprived of the benefits of the administrative machinery it has created to adjudicate disputes and to avoid large damage claims." *U.S.* v. *Blair*, 321 U.S. 730, 735 (1943)

The disputes clause was for the benefit of petitioner as well as the USDA. The failure of the USDA to make any decision under it was, in and of itself, a breach of contract, *Cape Ann Granite Co.* v. *U.S.*, 100 Ct. Cl. 53, 71 (1943).

The Court below nonetheless denied the disputes clause its proper legal effect, by giving no weight whatsoever to the clause, and instead, penalizing petitioner properly for failing to take administrative appeal as a remedy for the disputes. (supra, pp. 10, 11)

Thus the decision below disregarded the contract and established law that the disputes clause is "the only avenue for relief". *U.S.* v. *Callahan Walker Construction Co.*,

317 U.S. 56, 61 (1942). The record, therefore, presents the question as to whether the Court of Claims has overruled and with retroactive effect the law established by this Court; or whether the Court below has selectively denied petitioner alone the benefit of that established law.

In respondent's statement it asserts that petitioner did not "invoke the former provisions of the disputes clause . . ." although conceding that petitioner did "complain to Washington . . ." (Resp. Br. p. 9). In argument, respondent again asserts that "it can scarcely be contended that the nature of the complaints and the manner in which they were made conformed to . . . the disputes clause." (Resp. Br. p. 17)

Respondent cites no support for these bald propositions for the very good reason that it has none. The disputes clause requires no formal procedure of any kind for its invocation. It applies automatically by its very terms to "any dispute . . . which may arise . . . and which is not disposed of by mutual agreement . . ."[10] Petitioner's complaints, and its urging that the promised USDA investigation pursuant thereto proceed with dispatch, placed USDA on clear notice of existence of the dispute and petitioner's reliance on USDA administrative machinery imbodied in the clause for a solution. (Pet. 40, 41) There is no question but that a dispute over the quality of goods bought by the USDA is within the clause. "No determinations could be more factual . . ." *United States* v. *Hamden Cooperative Creamery Co.*, 297 F.2d 130, 133 (C.A. 2, 1961).

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[10] The question of whether proper *appeal* was taken from the contracting officers' decision has often been litigated. See Joy, The Dispute Clause in Government Contracts, 25 Fordham L. Rev. 11, Esp. 29-38. Respondent's contention that some secret ritual is required to invoke action by the contracting officer is apparently unprecedented.

II. RESPONDENT'S BRIEF ANALYZED

Petitioner has demonstrated that respondent ignores, and thereby tends to suppress and conceal legal issues of grave import presented by the record (*supra* pp. 2-14).

Respondent's brief possesses the virtue of consistency. It similarly disregards and plays down all other aspects of the case presented to this Court by the record—factual as well as legal.

The eminence of opposing counsel and their extensive experience before this Court compel the conclusion that respondent's brief amounts essentially to a studied and deliberate avoidance of the true case.

There is a certain human wisdom in the folk saying that when one is wrong, "The less said, the better"! It is also true, as a matter of linguistics, that the failure to deal with material matters may be superficially concealed by discussion of irrelevancies.

Specific analysis of respondent's brief, part by part, shows consistent awareness and practice of these rhetorical techniques.

A. RESPONDENT'S STATEMENT OF THE CASE CONCEDES THE ACCURACY OF PETITIONER'S STATEMENT: OTHERWISE THE CASE IS MIS-STATED BY RESPONDENT

Respondent's statement takes very little issue with petitioner's statement of the case. As a consequence, respondent largely concedes the completeness and accuracy of petitioner's statement.

The rules of this Court require respondent's brief to disclose "any matters or ground why the case should not be reviewed." (Rule 24, par. 1)

Implementing that general requirement of full and fair presentations is the *specific* directive in this Court's rules that respondent's *statement* include, "what may be deemed

necessary in correcting inaccuracy or omission of the other side.[11] "It is fundamental that the Court . . . may accept the statement of the (petitioner) touching on the facts of the case unless these are controverted by the (respondent). The Court cannot be expected to search the record for support of all the statements made by (petitioner). It does so only when a controversy as to such statement is created by a contrary statement in the brief of (respondent)." *Investment Funds Corp.* v. *Bomar*, 306 F. 2d 32 (C.A. 5, 1962).

1. The Preamble to Respondent's Statement

The preamble with which respondent begins its statement (Resp. Br. pp. 6, 7) contains a minor inaccuracy, heretofore mentioned. Otherwise it contains nothing of significance. (Supra p. 1) In effect, it sets forth what might be called "vital statistics," such as the existence of petitioner, the fact that contracts were made, and the further fact that petitioner experienced troubles in performing.

These vital statistics might well have been left unsaid. They serve only to make it appear to the casual and superficial reader that respondent is saying something of importance.

2. Respondent's Statement: "Facts Pertaining to Count I"

This portion of respondent's statement (pp. 7-9) pursues the same tactics. Of the eight paragraphs (supplemented by two footnotes) only one—the next to the last—(p. 9) does anything more than re-state "vital statistics" already stated by petitioner.

That single paragraph is largely composed of assertions designed to avoid the merits of the issues, and relating to

[11] Rule 40, par. 3, made applicable to briefs and opposition to petitions for certiorari Rule 24, par. 1.

the doctrine of failure to exhaust administrative remedies. Respondent refers in that connection to the regulations regarding administrative appeal of USDA egg grading, and the disputes clause.

To these matters, petitioner has already replied (supra pp. 10, 11, 13, 14). The remaining assertions of this paragraph are untrue.

Petitioner did not, as respondent there asserts, contend that, "the lots offered for inspection failed to meet PY-61 requirements only because . . . fraudulently undergraded . . ." Respondent also contended, and with equal legal force, that McCurley and Young were biased and arbitrary in their gradings and failed to exercise honest judgment in inspecting the eggs sold. (Pet. 12, 58; Resp. Br. 6) Petitioner also asserted and proved that McCurley and Young had rejected lots tendered without inspection and had used an improper candler which, in effect, elevated the contract standards; and that these practices also accounted for the failure of McCurley and Young to certify the lots as meeting the contract requirements as well as excusing petitioner from passing inspection (Pet. 12, 35-38, 42, 43).

Nor is it true, as respondent states in the paragraph in question that the USDA, "investigation failed to substantiate petitioner's claims." Respondent's record reference to support this statement is to testimony by Shearer, that his particular investigation confirmed the accuracy of the gradings of McCurley and Young. But his testimony is belied by his own gradings. While McCurley and Young were rejecting, without exception, 36 lots known by them to belong to petitioner, Shearer despite that atmosphere of rejection accepted 6 of 7 lots he personally inspected. (Pet. 33-35)

3. Respondent's Statement: "Facts Pertaining to Count V"

Once more respondent exhibits the dubious virtue of consistency. This portion (pp. 9-13) of respondent's statement also either re-states insignificant "vital statistics" previously stated by petitioner or misstates the case.

Respondent's misstatements are largely concentrated on Instruction No. 918, asserting it made bonded graders, and Mrs. Chambers in particular, subordinate to Government employees, and incapable of certifying official grade. (pp. 10, 11). Petitioner has already shown these assertions to be specious, both as a matter of fact and as a matter of law. (supra pp. 4, 5, 11, 12) More misstatement occurs in respondent's description of events surrounding the cancellation by the USDA of petitioner's grading service contracts. (p. 12)

Respondent's first misstatement in this connection is the assertion that "Petitioner ordered Schoonover out of his plant." Both the record reference of respondent, and the record as a whole, fail to support that statement.

The USDA telegraphic cancellation notice of May 3, 1955 stated (App. 71, 72):

> "As requested in your letter of April 27, 1955 and *because of* actions taken by you and Mr. Altheide on May 2 and 3 in barring Schoonover from your plant all contracts for grading services with the Agricultural Marketing service to be furnished at Avon and Bushnell are hereby cancelled, effective close of business May 3, 1955." (Emphasis supplied.)

The testimony of Schoonover himself, of Mr. Nichols, and Mr. Altheide (Tr. 1023, 666, 344) unanimously oppose any such barring of Schoonover from petitioner's plants. There is no other testimony on the subject in the record, and no finding of the Court below supports this particular assertion. The telegram's error defendant repeats.

This portion of respondent's statement indicates further confusion on respondent's part as to the circumstances of the cancellation of the contracts.

Respondent erroneously asserts (p. 12) that petitioner requested replacement of Schoonover only *after* Schoonover removed all Government property at Dolson's direction after leaving petitioner's plants. For days *beforehand* petitioner had been pleading with Washington to replace Schoonover, and requesting that service be suspended, rather than the contracts be cancelled. (App. 69-72; Petition 53, 54; infra pp. 22-25)

Respondent concludes this portion of its statement by quoting (pp. 12, 13) as authority on the case, this portion of the opinion of the court below which expressly condemns petitioners. This is "Operation Boo strap," discussed infra. It amounts to begging the very question before this Court for its independent review, and closely verges on name-calling. Respondent had full opportunity to demonstrate that petitioner's charges were unsupported, but deliberately, and in violation of this court's rules, defaulted on the merits of those charges. (supra pp. 15-19) It ill becomes respondent to quote and adopt the condemnation of petitioner expressed in the opinion of the court below.

B. RESPONDENT'S ARGUMENT

1. The False Issue of Conflicting Evidence

Respondent's argument consists for the most part of assertions it seems to bolster by quoting a portion of the opinion of the Court below, that the primary issue in the case is "the weight to be given to conflicting evidence" which the Court below "after a careful review of the whole record" resolved against petitioner. (pp. 13, 14)

This argument has no counterpart in respondent's statement of the case. Petitioner's statement demonstrated that its case was based on findings by the Court and

undisputed, uncontradicted evidence which the Court below largely disregarded (Pet. 27-56); and that the state of the record permits this Court to make "an independent determination as to the legal conclusions and inferences which should be drawn from" the findings and evidence substantially undisputed. *U. S.* v. *Mississippi Valley Generating Co.*, 364 U.S. 520, 526 (1961).

Respondent is precluded by this Court's rules from arguing contrary to the case as stated by both parties. The rules expressly require the statement of the case to contain "appropriate references to the printed record" (Rule 40, par. 1(e)). All references to the record also "must be accompanied by the record page number." (Rule 40, par. 2)

Respondent apparently recognizes that its argument is required to be based upon its statement of the case, since its argument, unlike its statement, contains no references whatsoever to the record.

Nonetheless, respondent in its argument represents to the Court that the case presented to it is only a jumble of conflicting evidence. The opposite respondent has been conceded both as a matter of law, and apparently by deliberate design, by failure to take issue with the petitioner's statement. (supra p. 15)

Respondent's argumentative assertion is made without any record reference to support it, a fact which makes it impossible for the Court to consider this question, "except by its reading and briefing the voluminous record. This (the Court could not) consent to do, and for the reason that (respondent's brief is) not prepared in conformity with the rules prescribed by this Court (it would) decline to consider this (argumentative assertion)". *Houston* v. *Southwestern Bell Telephone Co.*, 259 U.S. 318 (1921)

There is then this reason, added to defendant's concession of the opposite, why this argumentative assertion cannot be accepted.

2. The Quotation From the Opinion Furnishes No Support to Respondent

As if furnishing support to this contention, respondent selects, by way of example, a portion of the opinion of the Court below, misdescribing it as a finding. (p. 15) It is settled law that the opinion is not and cannot serve as a substitute for findings. *United States* v. *Esnault Petrie*, 299 U.S. 201 (1936); *American Propeller & Manufacturing Co.* v. *United States*, 300 U.S. 475 (1936); *United States* v. *Causby*, 328 U.S. 256 (1945); *United States* v. *Penn Foundry & Mfg. Co.*, 33 U.S. 198 (1948).

Petitioner has shown (Pet. 23-27) and its statement of the case demonstrates that to search for error and misdescription of the case in the opinion of the court below is like searching for water in the sea. The portion of the opinion quoted by respondent has been specifically shown to be at variance with the facts of record not subject to substantial dispute. (Pet. 13, 27, 28, 30, 38) The opinion cannot properly be used to support, and in light of the record does not in fact support respondent. As a matter of logic, the opinion cannot lift the decision by its own bootstraps. To attempt to use it in that regard is in effect to request this Court to abdicate its function of review.

3. The Remainder of Respondent's Argument is Groundless

a. Exhaustion of Administrative Remedies

For the most part the remainder of respondent's argument deals with the doctrine of exhaustion of administrative remedies involving the administrative appeals regulation and the disputes clause. (pp. 16, 17) To these contentions, petitioner has already replied. (supra pp. 9-14). Moreover, such a defense even if it were valid, would relate only to dishonest and prejudiced grading by McCurley and Young. It would not extend to rejection of lots tenderd without inspection, because not reworked nor to use of B.B.

candler in violation of the contract terms. (Pet. 35, 36, 42, 43) Petitioner learned the characteristics of that candler only after all grading had been completed under the contracts of sale. (Pet. 42)

b. The Cancellation of the Contracts

Respondent asserts in argument (p. 14) that the "grading service contracts . . . (were) cancelled by the government at petitioner's request." Respondent here goes beyond its statement on the same subject. There respondent says (p. 12) that petitioner "wrote to Washington requesting reconsideration of the situation and replacement of Schoonover by inspectors more amenable to petitioner, or waiver of cancellation notice and cancellation of the contracts. *Subsequent telegrams indicated greater insistence on the first alternative than on the latter . . .*" (Emphasis supplied)

The correspondence fairly construed leaves no doubt as to the accuracy of the Commissioner's findings that the cancellation notice "appears to completely ignore petitioner's clarification telegrams . . ."[12] (F107, fn. 36, R. 153; Pet. 53, 54) Like the court below respondent stresses and takes out of context portions of numerous telegrams and letters exchanged between petitioner and USDA, thereby requiring petitioner to review them.

On April 22, 1955, petitioner wired USDA "requesting immediate replacement of Schoonover . . . or a waiver of inspection service . . ." (F72, R. 69) Such a waiver would have left the contracts in effect and have permitted petitioner to complete its sales to the Army, with Army inspec-

[12] Referred to by respondent as "subsequent telegrams."

tion, rather than inspection with Schoonover.[13] The contracts, of course, left petitioner the right to determine its own needs for USDA grading service; and suspension of service had occurred frequently in the past, leaving the contracts in effect. (Pet. 52)

In reply the USDA on April 26 wired petitioner that it could "apply for cancellation without consideration to the 30-day clause . . ." relating to notice of cancellation. (F72, R. 70)

On April 27 petitioner wrote the USDA a lengthy letter which was essentially a plea to stay in business rather than have the contracts cancelled, and which stated in part: (F73, App. 70)

> ". . . I realize as you also do that complete cancellation of your contract for USDA service will undoubtedly automatically cause us to cease operations. If for any reason you feel after finding out the true facts that cancellations of your contracts are in order we will accept your decision and close the business.
>
> • • • • •
>
> "13. We are left no alternative from your telegram but to accept the present grader Mr. Schoonover or request cancellation; It is impossible for us to accept

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[13] The Commissioner found (F108, R. 154):

> "Since PMA declined to make any change in its assignment of Schoonover to plaintiff, it was plaintiff's desire to have the continuing service for shell egg grading suspended so that he could avail himself of the Veterinary Corps inspectors. "In 1949, the plaintiff had requested and received suspension of its service contract because of economic reasons."

The court did not adopt this particular finding, although adopting others on both sides of it (F75,76, App. 72), even though defendant took no exception to the foregoing findings by the Commissioner. (Def. Br. & Excep. 198, 171, 172) As the correspondence record and the findings demonstrate, the USDA cancelled the contracts without ever granting petitioner's request for suspension of service, made as a matter of right.

> the present grader under the circumstances either physically, financially, or mentally and altho we would like to receive the service on the proper basis and *do not wish same*[14] must request immediate cancellation unless given reconsideration by yourself or a superior."

It is the letter of April 27 quoted above which the court and respondent rely upon for the conclusion that petitioner desired and requested cancellation. (App. 18-20, Resp. Br. 12) The lack of petitioner's desire is expressly stated, as is the plea for personal investigation by Mr. Hamann, Chief of the Grading Branch, PMA, to whom the letter was addressed. "It is not uncommon for a citizen to repose upon the good faith and discretion of some public officer representing the Government and responsible for the protection of its interests in a transaction, and the citizen frequently consents to stipulate, submitting client's matters to the judgment of such officer. In such cases, however, such officer is required to exercise the highest degree of care, good faith and honest judgment, and must not act arbitrarily or capriciously. The party who has stipulated to submit a matter to the judgment of another is entitled to have it exercised in good faith by the officer nominated and cannot be bound unless such officer acts reasonably and with due regard to the rights of both contracting parties." *Globe Grain Co.* v. *United States*, 70 Ct. Cl. 595, at 625, 626.

That Hamann knew petitioner was not requesting and did not desire cancellation is evident from his telegram to petitioner of April 29 in which he stated: (F73, App. 71)

> "Please clarify your statements requesting waiver of service and discontinue our present business do you desire to cancel your contracts for grading service and request that we waive the 30 day cancellation clause please advise immediately."

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[14] Emphasis supplied. The reference by "same" is clearly to cancellation.

On April 29 petitioner wired Hamann stating in part: (F74, App. 71)

> ". . . our dealers met and are desirous continuing business if possible please read our letter 27th and advise accordingly suggest you give serious consideration to reconsidering entire situation before making a decision."

Another wire from petitioner to Hamann, also on April 29, stated: (F74, App. 71)

> ". . . note your wire states contracts plural when at issue is contract here and Schoonover be advised we wish to continue contracts Bushnell plant and same should be left alone unless you are deliberately attempting to void them."

Without further communication with petitioner the telegraphic cancellation notice was sent by Hamann May 3, stating in part: (F74, App. 71, 72)

> "As requested in your letter of April 27, 1955 and because of actions taken by you and Mr. Altheide on May 2 and 3 in barring Schoonover from your plant all contracts for grading services with the Agricultural Marketing service to be furnished at Avon and Bushnell are hereby cancelled, effective close of business May 3, 1955 the acceptance of your notice of cancellation of contracts does not affect your privilege of requesting non-contract grading under the regulations."

The following day petitioner protested the cancellation by wire to Hamann stating in part: (F75, App. 72)

> "In reply to your telegram May 3rd cancelling contracts made no request for any cancellation. In our letter April 27th 1955 we offered to accept your decision on questions after personal investigation by you here which you did not make that offer now withdrawn did not bar Schoonover from plant."

The record of correspondence thus demonstrates that not even the USDA thought petitioner wanted or had

unconditionally requested cancellation. What petitioner wanted and requested, was a suspension of service while the situation was investigated. This, the USDA denied petitioner, instead repeatedly inviting cancellation of the contracts, though knowing this would in effect put petitioner out of business. Finally the USDA sought to twist Schoonover's departure into a barring of him from the plant, as the main reason used and given for the cancellation.

The cancellation extended to contracts involving Bushnell where Mrs. Chambers was a licensed and functioning frozen egg inspector. Those contracts were not even involved, as petitioner's second telegram of April 29 specifically stated. Their cancellation, therefore, completely precluded the conclusion that the cancellation was pursuant to request by petitioner.

The undisputed evidence further establishes that during this exchange of telegrams the USDA officials involved failed to accept and failed to return repeated telephone calls from petitioner's attorney. (Pet. 54) That petitioner did not bar Schoonover from its plant has already been demonstrated. (Supra p. 18)

3. Significant Omissions From Respondent's Argument

a. Counts II, III and IV

Respondent's argument makes no mention of Counts II, III and IV. This omission is made even more striking by respondent's failure to uphold the court's finding that petitioner admitted in oral argument it had failed to prove it sustained any damages under those counts. (F3, App. 21) Instead, and consistently with petitioner's presentation (Pet. 17) respondent in its statement of the case describes that admission by petitioner as being "at least that it had been unable to prove 'full damages' ". (p. 7)

Thus both expressly, and by failure to mention Counts II, III and IV, respondent apparently concedes the court

below improperly gave no consideration to those counts as claims in their own right. It is also plain, that the wrongs committed under those counts compel the conclusion that McCurley and Dolson, the culprits, were engaged in a campaign against petitioner to wrong it in other respects through their power over the grading service at the very time McCurley graded the eggs sold. Such a course of action completely negates any possibility that McCurley acted fairly in the grading. (Pet. 18, 21-24).

b. Counts I and V

Petitioner's argument, like its statement of the case (supra pp. 15-19) almost completely ignores the facts showing that recovery should have been allowed under those counts, and that the court disregarded its own findings, and uncontroverted evidence, in denying such recovery.

Respondent's argument also fails to address itself to important legal issues presented by the record (supra pp. 2-18) and by the petition (pp. 3, 58-67). The only legal argument made relates to exhaustion of administrative remedies. (Resp. Br. 47)

III. CONCLUSION

Respondent's brief on analysis furnishes clear demonstration of strong and compelling reasons why the writ of certiorari should be granted.

This it does largely by what it does not say. By omission to take issue with petitioner's statement, and failure to discuss the grave legal issues presented respondent, in violation of the rules of this Court, defaults on the existence of those reasons.

Respondent's strategy seems to be to minimize, to depreciate and to belittle the issues involved by treating them as if non-existent. At the same time, respondent mis-

states the issues as involving determinations of fact arrived at on the basis of conflicting evidence. Such misstatement of the issues, if accepted as accurate, would naturally incline this Court to deny certiorari to avoid a time consuming and burdensome task, not its province to perform.

This Court should not be beguiled by such tactics. It must recognize that the errors of fact and law are so widespread, so uniformly adverse to petitioner, and so unjustifiable, as to amount, in their totality, to the denial to petitioner of a full and fair hearing and the equal justice under law to which petitioner is entitled under the Fifth Amendment.

It is particularly significant that such hearing was denied by the Court of Claims, a court of first instance, so that petitioner and three generations of the Nichols family have as of the present time, been ruined, and expressly ridiculed and defamed; without a fair hearing, by the very court established to consider and fairly rule upon its complaints: in fact the only court to which petitioner could go.

The discretion to grant or deny certiorari was certainly never intended, and certainly has never been exercised by this Court, so as to result in a person being denied justice by the federal judicial system without a fair hearing, let alone to permit unfair judicial ridicule and condemnation to stand uncorrected.

The questions of law which the court below decided erroneously are in conflict with law established by the decisions of this Court, courts of appeal, and state courts as well. They include federal questions involving the power of the Department of Agriculture to discriminate between persons engaged in marketing agricultural products, the Administrative Procedure Act, and the disputes clause, which is standard in government contracts. The decision below in its totality has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. The inability

and unwillingness of respondent to discharge its burden of demonstrating the opposite confirms those conclusions. The writ should be granted.

Respectfully submitted,

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